

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FAITH D MARTIN, et al,

No C 06-6883 VRW

Plaintiffs,

ORDER

v

FEDEX GROUND PACKAGE SYSTEM, INC,
and DOES 1-10, inclusive,

Defendants.

_____/

This wage and hour class action lawsuit involves claims that defendant FedEx Ground Package System, Inc ("FedEx Ground") failed to provide meal and rest periods to its hourly employees in violation of California law. The parties reached a settlement on October 12, 2007, Doc #35, and the court now considers whether to grant preliminary approval of the settlement.

On April 22, 2008, plaintiffs moved for: (1) leave to file an amended complaint, (2) preliminary approval of the class

1 action settlement, (3) conditional certification of the class for
2 settlement purposes, (4) approval of the proposed form of notice,
3 (5) establishment of an opt-out, objection and claim procedure and
4 (6) scheduling of a hearing on final approval of the proposed
5 settlement. Doc #47. On July 8, 2008, the court granted leave to
6 file an amended complaint but denied preliminary approval based on
7 its concerns with the proposed notice and the vague description of
8 how class counsel calculated the settlement value. Doc #62. Class
9 counsel filed a revised proposed notice, Doc #71 Exh 1, and further
10 explanation of its calculations, Docs ##67-1,8; 71. On December
11 18, 2008, the court held a hearing to determine whether the court's
12 initial concerns were sufficiently satisfied to allow the court to
13 grant preliminary approval.

14 The proposed settlement appears to have been heavily
15 negotiated, the product of an extensive mediation that proved
16 satisfactory to the parties. But satisfaction of the parties,
17 although a necessary condition to settlement of a class action, is
18 not sufficient. Court approval hinges on a demonstration that the
19 settlement is fundamentally fair. See FRCP 23(e)(2); In re Syncor
20 ERISA Litigation, 516 F3d 1095, 1100 (9th Cir 2008). The court
21 noted on July 8 that the proposed settlement had three major
22 shortcomings: (1) the settlement appeared to be premised on certain
23 assumptions about the class's missed meal and rest breaks,
24 assumptions that may very well be reasonable, but assumptions the
25 parties have failed to show are rooted in the evidence; (2)
26 although the attorney fees requested appeared reasonable in
27 relation to the amount of work counsel put into the case, the
28 failure to substantiate the damages the class was likely to recover

1 made it impossible to conclude that the proposed attorney fee award
2 was reasonable in relation to the benefit conferred on the class;
3 and (3) the proposed form of notice omitted a material term of the
4 settlement, the number of opt-outs that triggered the defendant's
5 right to withdraw from the settlement. Doc #62 at 2.

6 In response to the court's concerns, counsel submitted
7 briefings and an affidavit describing how they had calculated the
8 value of missed breaks. Docs ##67-1,8; 71. Counsel also revised
9 the proposed notice to incorporate the court's recommended
10 modifications. Doc #71 Exh 1.

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12 I

13 A

14 The parties' proposed settlement would terminate two
15 actions, the above-captioned case and a separate case pending in
16 the Orange County superior court, Olguin v FedEx Ground Package
17 System, No OCSC 02CC0020. Both cases are described below.

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19 1

20 Plaintiff Faith Martin filed this action in the San
21 Francisco superior court on September 20, 2006, against FedEx
22 Ground, a large package delivery company with numerous distribution
23 centers in California and throughout the United States. Doc #1,
24 Exh A. On November 2, 2006, FedEx Ground removed the action to
25 this court based on diversity jurisdiction. Doc #1. The case was
26 assigned to former Judge Martin J Jenkins. In anticipation of
27 Judge Jenkins's resignation from office, on February 15, 2008, the
28 case was reassigned to the undersigned. Doc #39.

1 Martin worked for FedEx Ground from December 2005 until
2 April 2006 as a non-exempt employee in a non-driver position at
3 FedEx Ground's Benicia/Vallejo terminal. Doc #48 at ¶3. Martin's
4 complaint, as originally filed, stated claims for compensation due,
5 failure to provide meal and rest periods in violation of Cal Lab
6 Code §§ 226.7, 512 and applicable wage orders, conversion, failure
7 to comply with itemized wage statement provisions under Cal Lab
8 Code § 226, penalties under Cal Lab Code § 203 and violations of
9 the unfair competition act, Cal Bus & Prof Code §17200, et seq.
10 Doc #1, Exh A at ¶¶16-49. Martin's action was brought on behalf of
11 all individuals who were non-exempt California employees of FedEx
12 Ground from September 20, 2002 until the date of trial. Doc #1,
13 Exh A at ¶12. The conversion claim was dismissed by Judge Jenkins
14 on January 9, 2007. Doc #12.

15 Martin has been represented at all times by Michael L
16 Carver and attorneys from his firm, the Law Offices of Michael L
17 Carver. See Doc #58, Exh 4.

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19 2

20 Plaintiffs Javier Olguin, Miguel Vargas and Kelly Freeman
21 filed their case in the Orange County superior court on July 18,
22 2002, and subsequently filed an amended complaint stating causes of
23 action for wages due, penalties under Cal Lab Code § 203, unfair
24 competition, accounting, injunctive relief and declaratory relief.
25 Doc #49 at ¶8. The motion for class certification submitted in
26 that action indicates it was brought on behalf of all individuals
27 who were non-exempt California package handlers of FedEx Ground
28 from October 1, 2000 until the date of trial. Doc #67-2 at Exh 1.

1 Plaintiffs in the Orange County litigation are
2 represented by Matthew Righetti and other attorneys from the
3 Righetti Law Firm and Geoffrey Gega and other attorneys from the
4 Cook Brown law firm. See Doc #58 at ¶20; Doc #58, Exh 5 at ¶3.
5 The Orange County plaintiffs' attorneys first appeared as counsel
6 in the Martin action on April 16 and 21, 2008. Doc ##43, 44.

7 Plaintiffs' counsel represents that the Orange County
8 litigation was stayed on October 10, 2007. Doc #49 at ¶16. By
9 that time, all pre-certification discovery in the Orange County
10 litigation had been completed and a motion for class certification
11 was about to be filed. Doc #49 at ¶13. According to plaintiffs'
12 counsel, the judge in the Orange County litigation stated that he
13 is amenable to having the settlement resolved in the district court
14 and that he will dismiss the Orange County case without prejudice
15 upon preliminary approval of the proposed settlement in this case.
16 Doc #49 at ¶16.

17
18 B

19 Although the class periods are different and the Orange
20 County action was brought on behalf of just California package
21 handlers (as opposed to all non-exempt employees in California),
22 the claims in both this action and the Orange County action present
23 the same factual and legal issues.

24 In California, employees who work more than five hours
25 per day are entitled to a meal period of "not less than 30 minutes,
26 except that if the total work period per day of the employee is no
27 more than six hours, the meal period may be waived by mutual
28 consent of both the employer and employee." Cal Lab Code § 512(a).

1 In addition, employees who work over 3.5 hours per day must receive
2 a minimum of a ten-minute rest break for each four-hour work
3 period, or major fraction thereof. Industrial Welfare Commission
4 Wage Order 9-2001 at §§ 11-12, available at
5 <http://www.dir.ca.gov/IWC/WageOrderIndustries.htm> (visited December
6 17, 2008). If an employer fails to provide a required meal or rest
7 period, the employer shall pay the employee one additional hour of
8 pay at the employee's regular rate of compensation for each work
9 day that the meal or rest period is not provided. Cal Lab Code §
10 226.7.

11 Plaintiffs in both actions allege that FedEx Ground did
12 not provide its employees with meal and rest periods as required by
13 law. According to plaintiffs, their primary duties were related to
14 processing packages through terminals and hubs; they were expected
15 to be at work stations along conveyor belts at all times the belts
16 were moving. The plaintiffs allege that in many instances, FedEx
17 Ground did not shut down the conveyors to allow employees an
18 opportunity to take their meal or rest periods. Doc #67 at 6.
19 Plaintiffs also allege that in 2004, after this lawsuit was filed,
20 FedEx Ground began stopping the conveyor belts at certain times to
21 facilitate employees' breaks. Id. FedEx Ground has asserted a
22 variety of defenses and denies all wrongdoing. Doc #49 at ¶11.

23 24 II

25 A

26 Under the proposed settlement, the class is defined as:

27 (1) Class No 1: All California FedEx Ground package
28 handlers who held their positions at FedEx Ground anytime
between October 1, 2000 and the date preliminary approval

1 of this Settlement is granted, and (2) Class No 2: all
2 California FedEx Ground non-package handler non-exempt
3 employees who held their positions at FedEx Ground
anytime between September 20, 2002 and the date
preliminary approval of this Settlement is granted.

4 Doc #50, Exh A at 2:11-16.

5 FedEx Ground agrees to pay a maximum settlement sum of
6 \$8,125,000 to settle all claims of the class, although the maximum
7 settlement may increase under certain circumstances described
8 below. Doc #50, Exh A at 10:22-24. According to the proposed
9 settlement, the payout fund will be reduced by plaintiffs'
10 requested attorney fees of \$2,681,250 (33 percent of the maximum
11 settlement sum), litigation costs not to exceed \$75,000,
12 administration costs estimated at \$250,000 and plaintiffs'
13 incentive awards estimated at \$40,000. Doc #50, Exh A at 12:8-14.
14 At the June 19, 2008 hearing on the proposed settlement, the
15 parties informed the court that Gilardi & Co has been selected as
16 the claims administrator and that administration costs are now
17 estimated at \$180,000. Doc #61 at 13:19-14:5.

18 After deduction of estimated costs, the maximum payout
19 available to class members under the proposed settlement is
20 \$5,148,750. Under the proposed plan of allocation, the payout fund
21 will be divided by the number of workweeks actually worked by all
22 class members during the class period to determine a "workweek
23 rate." Doc #50, Exh A at 12:24-27. Each plaintiff who returns a
24 valid claim form will become a "settlement class member" and will
25 be entitled to a share of the payout funds. Doc #50, Exh A at
26 13:6-8. Each settlement class member will receive a payment equal
27 to the workweek rate times the number of workweeks that he or she
28 was a class member. If 48 percent of the maximum payout funds are

1 not claimed by settlement class members, then settlement class
2 members will receive the difference between the amount claimed and
3 48 percent of the maximum payout funds on a proportional basis.
4 Doc #50, Exh A at 13:8-11. In other words, assuming the cost
5 estimates above are correct, FedEx Ground will pay at least
6 \$2,471,400 (48 percent of \$5,148,750) to class members regardless
7 how many claims are submitted. Any payout funds not paid to
8 settlement class members revert to FedEx Ground. Doc #50, Exh A at
9 13:21-22.

10 In reaching the settlement, FedEx Ground estimated that
11 the number of workweeks worked by class members during the class
12 period up until October 31, 2007 is 1,049,174. FedEx estimated
13 that 5,600 additional workweeks would be worked by class members
14 each week after October 31, 2007. Doc #50, Exh A at 13:27-14:5.
15 If the actual number of workweeks during the class period exceeds
16 the estimate by more than ten percent, then the maximum payout
17 figure will be divided by the estimated number of workweeks, rather
18 than the actual figure, to determine the workweek rate. The payout
19 to settlement class members will be calculated by multiplying the
20 workweek rate by the number of workweeks actually worked by the
21 settlement class member. Doc #50, Exh A at 14:19-24. Under these
22 circumstances, if enough class members submit valid claims, the
23 maximum settlement sum could exceed \$8,125,000. Plaintiffs'
24 counsel estimate that settlement class members will receive
25 approximately \$200 per year worked. Doc #49 at ¶19; Doc #68 Exh 1
26 at 3.

B

In this case, the court finds that the procedure for reaching this settlement was fair and reasonable and that the settlement was the product of arms-length negotiations. Each of the three groups of lawyers representing plaintiffs are led by attorneys with substantial experience in wage and hour class actions. Doc #49 at ¶3, Doc #48 at ¶8, Doc #52 at ¶¶15-16. FedEx Ground was represented during negotiations by experienced counsel as well. Doc #49 at ¶10. Settlement occurred after extensive discovery in the Orange County litigation, and discovery was conducted in the Martin case as well. A day-long JAMS mediation session was held before a retired judge, followed by months of subsequent negotiations. Doc #49 at ¶15.

Perhaps because of the highly negotiated nature of the settlement, the court on July 8 noted that the settlement itself failed to spell out some of the settlement's underlying assumptions, including how counsel arrived at the estimated value of plaintiffs' claims. Doc #62 at 9. Having reviewed counsel's further submissions explaining those underlying assumptions, Docs ## 67;71, the court is now satisfied that it understands the value of the settlement for the class members.

Extensive discovery was conducted in the Orange County litigation. The parties served and answered ten sets of interrogatories, twelve sets of document requests and nine sets of requests for admission. Approximately 46 depositions were taken. Doc #49 at ¶12. Discovery was conducted in the Martin case as well, including three on-site facilities inspections and review by the plaintiff's counsel of tens of thousands of pages of discovery

1 material provided by FedEx Ground. Doc #49 at ¶12.

2 Based on this discovery, plaintiffs' counsel have
3 estimated potential damages in this case. Specifically, counsel
4 estimated that approximately 77 percent of total shifts worked were
5 3.5 hours or longer, making them eligible for rest breaks, and that
6 5 percent of shifts were over six hours, making them eligible for
7 meal periods. Doc #67-8 at ¶3. Further, based on interviews with
8 class members, counsel estimated a rest period compliance rate at
9 50 percent for shifts worked through 2002 and an increasing rate of
10 compliance to approximately 95 percent in 2004. Id at ¶5. Using
11 data provided by FedEx Ground, counsel determined that the
12 compliance rate for meal breaks was approximately 45 percent
13 throughout the class period. Id at ¶10. With these percentages
14 and the number of workweeks during the class period, counsel
15 estimates the value of missed rest periods at \$4,920,496 and missed
16 meal periods at \$1,086,384 for both classes for a total of
17 \$6,006,844. Doc #71 at ¶15. The potential interest value amounts
18 to an additional \$2.2 million. Id. Thus, counsel estimate the
19 total potential damages for both classes to be \$8,206,844. The
20 court is satisfied that these numbers represent a reasonable
21 damages calculation based on the evidence available to counsel.

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23 C

24 Plaintiffs' counsel seek an award of attorney fees in an
25 amount not to exceed \$2,681,250, plus litigation costs not to
26 exceed \$75,000. Doc #50, Exh A at 11:2-5. If the entire maximum
27 settlement of \$8,125,000 is paid, the requested fee award
28 represents 33 percent of the settlement.

1 "Attorneys' fees provisions included in proposed class
2 action settlement agreements are, like every other aspect of such
3 agreements, subject to the determination whether the settlement is
4 'fundamentally fair, adequate, and reasonable.'" Staton v Boeing
5 Co, 327 F3d 938, 963 (9th Cir 2003), quoting FRCP 23(e). The court
6 is obligated to conduct an independent inquiry into the
7 reasonableness of any attorney fee provisions of a class action
8 settlement even in the face of an agreement between the parties
9 regarding the payment and amount of attorney fees and costs.

10 Common fund cases create a situation in which normal
11 reliance on the adversary process to police the appropriateness of
12 a fee award is unavailing. Report of the Third Circuit Task Force,
13 Court Awarded Attorney Fees (Task Force Report), 108 FRD 237, 251
14 (3rd Cir 1985). The prospect of a sizeable attorney fee award can
15 drive a wedge between the class and class counsel, the former
16 interested in the largest settlement obtainable for the class and
17 the latter in the largest fee award obtainable. Unsurprisingly, a
18 class action defendant has little or no incentive to contest the
19 amount allocated to attorney fees in a proposed settlement,
20 provided the total amount of the settlement is acceptable. "Since
21 the defendant is interested only in the total size of its
22 liability, so long as the settlement is accepted, it will often be
23 indifferent as to the division of the fund between the plaintiffs'
24 recovery and the attorneys' fees." Task Force Report at 266.

25 "[T]o avoid abdicating its responsibility to review the
26 agreement for the protection of the class, the Ninth Circuit
27 requires that a district court must carefully assess the
28 reasonableness of a fee amount spelled out in a class action

1 settlement agreement." Staton, 327 F3d at 963 (citations omitted).

2 "In 'common fund' cases where the settlement or award
3 creates a large fund for distribution to the class, the district
4 court has discretion to use either a percentage or lodestar
5 method." Hanlon v Chrysler Corp, 150 F3d 1011, 1029 (9th Cir
6 1998). Although this court's practice is to use the lodestar
7 method, the court notes that the requested fee of \$2,681,250
8 represents at least 33 percent of the total settlement and possibly
9 more; in other words, it is well above the 25 percent benchmark
10 that the Ninth Circuit uses in common fund cases. See Hanlon, 150
11 F3d at 1029. This may inform the court's analysis of whether the
12 multiplier implied by counsel's lodestar figure is reasonable.

13 Plaintiffs' counsel have submitted data on their own
14 stated hourly rates, but the court prefers to calculate the
15 lodestar figure using published data on hourly rates. Standardized
16 hourly rates result in a meaningful comparison among multipliers in
17 various cases. If the standardized rates are lower than actual
18 rates billed by attorneys, then a comparison of multipliers in many
19 cases will indicate a higher standard multiplier. Thus, counsel
20 need not worry whether the standardized rates reflect their actual
21 billing practices; the court seeks only to compare lodestar
22 multipliers calculated at the same standardized hourly rates across
23 many common fund cases.

24 A widely recognized compilation of attorney and paralegal
25 rate data is the Laffey matrix, so named because of the case that
26 generated the index. In Laffey v Northwest Airlines, Inc, 572 F
27 Supp 354 (DDC 1983), aff'd in part, rev'd in part on other grounds,
28 746 F2d 4 (DC Cir 1984), the court employed a variety of hourly

1 billing rates to account for the various attorneys' different
 2 levels of experience. The Laffey matrix has been regularly
 3 prepared and updated by the Civil Division of the United States
 4 Attorney's Office for the District of Columbia and used in fee
 5 shifting cases, among others. See
 6 [http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix](http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_3.html)
 7 [_3.html](http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_3.html), visited December 17, 2008. The Laffey matrix is
 8 especially useful when the work to be evaluated was performed by a
 9 mix of senior, junior and mid-level attorneys, as well as
 10 paralegals, as is typically the case in class action litigation.

11 Under the 2007-2008 Laffey matrix, attorneys bill at the
 12 following rates according to experience:

<u>Experience</u>	<u>Rate Per Hour</u>
20+ Years	\$440
11-19 Years	\$390
8-10 Years	\$315
4-7 Years	\$255
1-3 Years	\$215
Paralegals & Law Clerks	\$125

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 20 These figures are, however, tailored for the District of
 21 Columbia, which has a different cost of living than San Francisco,
 22 Chico and Santa Ana, California (the cities in which plaintiffs'
 23 counsel operate). Accordingly, some adjustment appears appropriate
 24 here. To make the adjustment, the court will use the federal
 25 locality pay differentials based on federally compiled cost of
 26 living data. See <http://www.opm.gov/oca/08tables/indexGS.asp>; In
 27 re HPL, 366 F Supp 2d 912, 921 (ND Cal 2005)(Walker, J)(adjusting
 28 locality pay differentials based on the geographical region in

which lead counsel's firm operated). A review of the pay tables shows the Washington-Baltimore area has a +20.89 percent locality pay differential; the San Francisco area ("SF") has a +32.53 percent locality pay differential; the Sacramento (Chico)("CH") area has a +20.25 percent locality pay differential; and the Los Angeles (Santa Ana)("SA") area has a +25.26 percent locality pay differential. Adjusting the Laffey matrix figures accordingly will yield appropriate rates for the respective geographical regions: +9.6 percent for San Francisco, -0.5 percent for Chico and +3.6 percent for Santa Ana.

Applying these adjustments the court obtains the following rates:

<u>Experience</u>	San Francisco Hourly Rate	Chico Hourly Rate	Santa Ana Hourly Rate
20+ Years	\$482.24	\$437.80	\$455.84
11-19 Years	\$427.44	\$388.05	\$404.04
8-10 Years	\$345.24	\$313.43	\$326.34
4-7 Years	\$279.48	\$253.73	\$264.18
1-3 Years	\$235.64	\$213.93	\$222.74
Paralegals & Law Clerks	\$137.00	\$124.38	\$129.50

The following table reflects the court's adjusted lodestar calculations for attorneys and paralegals working on the case. See Doc #58 at Exh 2, 4 and 5.

<u>Attorney/ Paralegal</u>	<u>Location</u>	<u>Years Experience</u>	<u>2007- 2008 Laffey Rate</u>	<u>Total Hours</u>	<u>Total Lodestar</u>
Carver, M	CH	14	\$388.05	289.9	\$112,495.70
Gega, G	SA	28	\$455.84	483	\$220,170.72
Glugoski, J	SF	11	\$404.04	738	\$298,181.52
Johnson, K	SA	7	\$264.18	10.05	\$2,655.01
Jose, A	SA	10	\$326.34	2.9	\$946.39
Lamb, E	CH	1	\$213.93	24.4	\$5,219.89
Lunde, M	CH	Paralegal	\$124.38	22.2	\$2,761.24
Maechtlen, L	SA	5	\$264.18	116.9	\$30,882.64
McCabe, T	SA	Paralegal	\$129.50	53.2	\$6,889.40
McGeorge, J	SA	6	\$264.18	23.4	\$6,181.81
Mesnier, J	SA	27	\$455.84	1	\$455.84
Patko, L	SA	3	\$222.74	152.75	\$34,023.54
Payne, S	SA	9	\$326.34	7.6	\$2,480.18
Righetti, M	SF	23	\$482.24	1,112	\$536,250.88
Sakai, K	SA	8	\$326.34	244.6	\$79,822.76
Savage, P	CH	4	\$253.73	87.7	\$22,252.12
Silva, R	SA	14	\$404.04	1102.95	\$445,635.92
Totals				4,473	\$1,807,306

First, it appears that, given the extensive discovery conducted in this case and the fact that the figures above reflect the labor of attorneys in two separate lawsuits - one pending in this court since September 2006 and the other pending in the Orange County superior court since July 2002 - it is reasonable that the attorneys in this case have spent 4,473 hours working on it.

The court now turns to the lodestar cross-check, which entails evaluation of the multiplier implied by lead counsel's

1 requested fee (\$2,681,250) and lead counsel's lodestar fee
2 (computed above as \$1,807,306). The lodestar calculation under the
3 Laffey methodology results in a multiplier of 1.48
4 ($2,681,250 / 1,807,306 = 1.48$). This multiplier falls below the
5 range the court has, in its experience, encountered and observed in
6 other common fund class actions. See, e g, Van Vranken v Atlantic
7 Richfield Co, 901 F Supp 294, 298 (ND Cal 1995)(Williams,
8 J)("Multipliers in the 3-4 range are common in lodestar awards for
9 lengthy and complex class action litigation.").

10 By the lodestar cross-check, the requested fee award
11 looks reasonable, indeed on the low side. Measured by the Ninth
12 Circuit's benchmark, the proposed fee award looks high. The court
13 is satisfied, however, that the award is not unfair. Lead counsel
14 was able to obtain a settlement value (\$8,125,000) that closely
15 resembles the total estimated damages, including interest
16 (\$8,206,844). Doc #71 Exh 1 at 2. Further, class counsel faced a
17 risk of non-recovery at the outset of the litigation, as class
18 certification is sometimes difficult to obtain in wage and hour
19 cases. See White v Starbucks Corp, 497 F Supp 2d 1080, 1081 (ND
20 Cal, 2007)(Walker, J). Because the lodestar cross check revealed a
21 relatively low multiplier of 1.48, the court is satisfied that
22 counsel's requested fee award is not unreasonable.

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24 D

25 The court must ensure that the notice sent to class
26 members is the best practicable under the circumstances. FRCP
27 23(c)(2)(B). In its July 8 order, the court listed some of its
28 concerns with the proposed notice. Specifically, the court noted

1 that the notice: (1) did not explain the basis for class counsel's
2 estimate of class damages, state the total damages available if the
3 case went to trial, or give an estimate of a typical class member's
4 recovery under the proposed settlement; (2) did not notify class
5 members that if eight percent of class members choose to opt out,
6 FedEx Ground has the option to withdraw from the settlement; (3) did
7 not state that the claims administrator will make a final, binding
8 determination of individual award amounts; (4) required class
9 members submit written notice before appearing at the final
10 settlement hearing. Doc #62 at 20.

11 Class counsel amended its proposed notice to address each
12 of the court's concerns. The revised notice contains a short
13 description of how class counsel calculated total potential damages
14 as well as a statement that the settlement amount of \$8,125,000 is
15 comparable to potential damages of \$8,206,844. Doc #71 Exh 1 at 2.
16 The revised notice also indicates that a typical class member's
17 recovery will be approximately \$200, but that the claims
18 administrator makes the final determination of all awards. Id at
19 3. The revised notice states that if eight percent of class
20 members opt out of the settlement, FedEx Ground can decide to
21 terminate the settlement. Id at 4. Finally, the proposed notice no
22 longer requires class members submit a written notice before being
23 heard at the final settlement approval hearing. Doc #68.

24 Because class counsel addressed each of the court's
25 concerns, the court is satisfied that the revised notice adequately
26 apprises class members of their rights under the settlement.
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E

Next, the court turns to the parties' motion to establish an opt-out, objection and claim procedure and schedule a hearing on final approval of the proposed settlement. The parties' proposed procedure is described in the settlement agreement, Doc #50, Exh A at 22:22-24:2, 25:12-28:7, and in the proposed notice of settlement, Doc #50, Exh A-1 at 3,6. The parties have established a timetable with tentative dates to complete the settlement approval process; however, these dates may need to be revised following the court's preliminary approval. Doc #71 ¶18.

Under the proposed procedure, the notice and claim form will be sent to class members in a single mailing. Doc #50, Exh A at 21:3-7. Class members who want to opt out of the class must submit a written request for exclusion no later than 45 days after the date of the first mailing of the notice or 30 days after the date of re-mailing of the notice, if any. Doc #50, Exh A at 23:19-22. Plaintiffs who wish to object to the settlement may file and serve a written objection or may simply appear at the fairness hearing. Doc #50, Exh A at 22:23-23:4; Doc #68.

Class members who wish to claim an award must submit the claim form no later than 45 days after the date of the first mailing of the notice or 30 days after the date of re-mailing of the notice, if any. Doc #50, Exh A at 25:12-22. The proposed claim form was filed as Doc #68 Exh 2. The court finds that the procedures proposed by the parties are for the most part fair and reasonable. Because the parties no longer require class members to submit a notice before appearing at the fairness hearing, the court now grants the motion to approve the proposed opt-out, objection

1 and claim procedure.

3 F

4 Finally, the court turns to the parties' request for
5 certification of a settlement class. The proposed definition for
6 the class is as follows:

7 (1) Class No 1: All California FedEx Ground package
8 handlers who held their positions at FedEx Ground anytime
9 between October 1, 2000 and the date preliminary approval
10 of this Settlement is granted, and (2) Class No 2: all
11 California FedEx Ground non-package handler non-exempt
employees who held their positions at FedEx Ground
anytime between September 20, 2002 and the date
preliminary approval of this Settlement is granted.

12 Doc #50, Exh A at 2:11-16.

13 On July 8, the court noted that the putative class meets
14 the numerosity, typicality and adequacy requirements of FRCP 23(a).
15 The court also found, pursuant to FRCP 23(b)(3), that common
16 questions of law and fact predominate over individual questions and
17 that class treatment of this matter is superior to any other
18 available means of adjudication. The court noted that it was
19 prepared to certify the class for settlement purposes at the time
20 problems with the settlement and proposed notice were resolved.

21 On July 22, 2008, however, the California court of
22 appeal issued its opinion in Brinker Restaurant Corp v
23 Hohnbaum, 80 Cal Rptr 3d 781 (4th Dist 2008). The court in
24 Brinker overturned the trial court's grant of class
25 certification for claims dealing with missed rest breaks,
26 because under California law employers do not need to ensure
27 employees take rest breaks and thus whether an employee
28 decided to waive a rest break amounts to an individualized

1 inquiry. 80 Cal Rptr at 800-01. The California Supreme
2 Court granted review, rendering Brinker not citable in state
3 court. Cal Rules of Court, Rule 8.1115. Nonetheless, the
4 court feels constrained to address whether Brinker's
5 reasoning should guide the court here.

6 Brinker dealt with a class of restaurant workers,
7 many of whom relied on tips for their wages and who may not
8 have wanted to take a break in the middle of a lucrative
9 shift. 80 Cal Rptr at 809-10. The Brinker court noted that
10 an individual inquiry into whether an employee had chosen to
11 skip a break or an employer had prevented him from taking a
12 break would be required. Id. In contrast, the California
13 court of appeal upheld certification of a class in a case in
14 which the employer had allegedly not provided employees with
15 meal breaks. Cicairos v Summit Logistics, Inc, 133 Cal App
16 4th 949 (3rd Dist 2005). The court in Cicairos found a group
17 of truck drivers to be a class because the drivers alleged
18 their employer had not offered them meal breaks and indeed
19 had encouraged them to make deliveries in a time frame
20 incompatible with taking a break. 133 Cal App 4th at 962-64.
21 Brinker distinguished Cicairos as follows: "breaks must be
22 provided, not ensured." 80 Cal Rptr at 809. If employees
23 allege common employer action that prevented employees from
24 taking breaks, under Cicairos the employees can be certified
25 as a class.

26 FedEx employees in this case allege that FedEx kept
27 conveyor belts running at all times during their shifts,
28 which effectively prevented them from taking a break. Doc

1 #67 at 6. Because FedEx employees allege facts to suggest
2 that FedEx Ground prevented employees from taking breaks, the
3 court is satisfied that the logic of Brinker does not affect
4 settlement class certification in this case and would not do
5 so if ultimately Brinker's reasoning is upheld by the
6 California Supreme Court. Accordingly, the court certifies
7 the settlement class pursuant to FRCP 23.

8 The court must also determine whether counsel and
9 named plaintiff can adequately serve the interests of the
10 class for settlement purposes. To make this determination,
11 the court looks to whether named plaintiffs and counsel have
12 any conflicts of interest with other class members and
13 whether named plaintiffs and counsel will fairly, vigorously
14 and competently prosecute the action on behalf of the class.
15 Lerwill v InFlight Motion Pictures, Inc, 582 F2d 507, 512
16 (9th Cir 1978). The court is satisfied that no potential
17 conflicts of interests have been raised and that counsel have
18 vigorously litigated this action from the outset. Thus, the
19 court certifies plaintiff and counsel as lead plaintiff and
20 class counsel for settlement purposes.

IV

For the reasons discussed above, the court GRANTS the motions for preliminary approval of the settlement, conditional certification of the class for settlement purposes, approval of the proposed form of notice and approval of the proposed opt-out, objection and claim procedure.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief
Judge